FEDERAL FLOUR MILLS LTD. v. OWNERS OF THE VESSEL "TA TUNG" & ANOR.

[O.C.J. (Raja Azlan Shah J.) April 4, 1970]

[Kuala Lumpur — Civil Suit No. 1455 of 1966]

Practice and Procedure — Joinder of additional parties — Claim in rem — Rules of Supreme Court, 1957, O. 16 r. 11.

In this case the plaintiffs, owners of a cargo of wheat shipped in bulk on board the vessel "Ta Tung" commenced an action *in rem* against the vessel, the owners and all parties interested for damage sustained by reason of the contamination of the cargo by fuel oil, which they alleged took place during the voyage or alternatively during discharge. The owners appeared and in their defence alleged negligence on the part of the stevedores. The plaintiffs applied to join the stevedores as defendants on the ground of convenience.

Held: (1) Order 16 rule 11 should be liberally interpreted and in this case the application to add the stevedores should be allowed;

(2) the court has an unfettered discretion to allow a claim *in personam* to be engrafted upon a claim *in rem* provided no injustice or inconvenience is caused when the case comes up for trial and in the circumstances of this case no difficulty will arise from the joinder of the stevedores and it was just and convenient that they be joined as defendants.

Cases referred to:-

(1) *Amon* v. *Raphael Tuck & Sons Ltd.* [1956] 1 Q.B. 357.

(2) *Gurtner* v. *Circuit* [1968] 2 Q.B. 587.

(3) *Re Vandervell Trusts* [1969] 3 All E.R. 496.

(4) *Pegang Mining Co. Ltd.* v. *Choong Sum & Ors.* [1969] 2 M.L.J. 52.

(5) *Byrne* v. *Brown* (1889) 22 Q.B.D. 657.

(6) *The Bowesfield* 51 L.T. 128.

(7) *The Germanic* [1896] P. 84.

(8) *The Cheapside* [1904] P. 339.

(9) *Metropolitan Asylum Board* v. *Sparrow* [1913] W.N. 115.

CIVIL SUIT.

M. Shankar for the plaintiffs.

Nik Mohamed Din for the defendants.

S. D. K. Peddie (*J. Puthucheary* with him) for the third party.

Raja Azlan Shah J.: The plaintiffs, owners of a cargo of wheat in bulk shipped on board the vessel 'Ta Tung' which sailed from a port in Australia to Port Swettenham, the port of discharge, commenced an action *in rem* against the vessel, the owners and all parties interested in her, for damage sustained by reason of the contamination of the cargo by fuel oil, which they alleged took place during the voyage or, alternatively during discharge. The owners appeared and statements of claim, defence and counter-claim were respectively delivered, the defence including an allegation of negligence on the part of the stevedores, *i.e.*, the Cargo Handling Corporation Sdn. Bhd., who were the plaintiffs' servants, agents etc. The owners of the vessel issued a third party notice against the stevedores but subsequently they withdrew the notice. The plaintiffs have now applied to join the stevedores as defendant on the ground of convenience. I allowed their application in chambers and the matter has since been adjourned to open court for further argument.

It is not disputed that the plaintiffs are entitled to the order sought only if they can bring themselves within the terms of the rule providing for the joinder of additional parties, *i.e.*, Order 16 rule 11 of which the relevant provision reads:

"The court or a judge may, at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the court or a judge to be just, order ... the name of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectively and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added."

That rule is in substantially the same terms as the former (English) Order 16 rule 11 and the R.S.C. (Revised) 1962, Order 15 rule 6(2)(b). It has been the subject of a number of judicial exegesis. In *Amon* v. *Raphael Tuck & Sons Ltd.*,[1] Devlin J. had examined the authorities so fully and exhaustively. He took a narrow view in construing the rule. His view did not find favour with the Court of Appeal in *Gurtner* v. *Circuit*[2] which disapproved *Amon* v *Raphael Tuck & Sons Ltd.* The Court of Appeal preferred a wide interpretation to the rule. That view was re-echoed by the Court of Appeal in *Re Vandervell Trusts*.[3] In *Pegang Mining Co. Ltd.* v. *Choong Sam & Ors.*,[4] the Privy Council had occasion to consider the rule and expressed preference for the liberal view propounded by Lord Esher M.R. in *Byrne* v. *Brown*.[5] Lord Diplock in delivering the opinion of the Privy Council thought that Devlin J.'s view was rightly overruled by the Court of Appeal in *Gurtner* v. *Circuit, supra.* I too, would prefer the liberal view whenever it is just and convenient to do so, so as, in the words of Lord Esher M.R. in *Byrne* v. *Brown, supra,* at page 666:

"... to secure that, wherever a court can see in the transaction brought before it that the rights of one of the parties will or may be so affected that under the forms of law other actions may be brought in respect of that transaction, the court shall have power to bring all the parties before it, and determine the rights of all in one proceeding. It is not necessary that the evidence in the issues raised by the new parties being brought in should be exactly the same; it is sufficient if the main evidence, and the main inquiry, will be the same, and the court then has power to bring in the new parties, and to adjudicate in one proceeding upon the rights of all the parties before it. Another great object was to diminish the cost of litigation."

That is not the end of the matter. It was urged by Mr. Peddie on behalf of the third-party that I should not exercise my discretion in favour of the application because the plaintiffs should not be allowed to engraft a claim *in personam* on an action *in rem.* He referred me to three cases which are cited in the *Annual Practice* (1963) at page 317 — *The Bowesfield*,[6] *The Germanic*[7] and *The Cheapside.*[8]

In *The Bowesfield*, Butt J. refused a motion by the plaintiffs in an action *in rem* under Lord Campbell's Act to amend their writ by adding the names of the registered owners of the vessel *Bowesfield* as defendants on the ground that the court had no jurisdiction to add parties as defendants, so as to convert an action *in rem* into an action *in personam. The Germanic* was a case of collision between two ships. The plaintiffs, owners of one of the ships issued a writ *in rem* against the other ship and the owners and those interested in

her. The defence was compulsory pilotage. They then applied to add the pilot as a defendant. That was an action *in personam*. If the application was granted then there would be two trials going on concurrently, one against the ship which would be a trial by a judge and assessors and the other against the pilot, which would be by the same judge and a jury. There would be the difficulty of applying different legal standards, because questions of negligence and contributory negligence might have arisen and therefore it might have been necessary to apply the common law standard and where no question of contributory negligence could arise, the Admiralty standard would have to be applied. Then there was the difficulty in drawing up the two judgments. The Court of Appeal as a matter of discretion refused the application. The difficulty that was envisaged by the Court of Appeal in *The Germanic* did not exist in *The Cheapside* and the court in exercising its discretion refused to strike out the counterclaim on the ground of embarrassment. There is another case, *Metropolitan Asylum Board* v. *Sparrow*.[9] That was also an action *in rem* against the owners of the ship in the Admiralty Division. The pilot elected to a trial by jury but that was refused. The Court of Appeal on the ground that the pilot had a right to a jury, ordered the action to be transferred to the King's Bench Division.

In the light of these authorities it is clear that in a given case like the present the court has an unfettered discretion to allow a claim *in personam* to be engrafted upon a claim *in rem*, provided no injustice or inconvenience is caused when the case comes up for trial.

In this country admiralty and common law cases are tried in the High Court without a jury, although where the judge requires expert advice on nautical matters, reference may be made to the Registrar with or without assessors: (See Order 56 of the Rules of the Supreme Court). The court will not envisage any difficulty in applying the various legal standards affecting the present case. The main evidence and the main enquiry would be the same *i.e.*, damage done to the cargo. There would be no difficulty in drawing up the judgment, in fact there would be only one judgment. On the whole the difficulty does not exist which was felt in *The Germanic* and other allied cases. In the circumstances of this case I think it is just and convenient that the Cargo Handling Corporation Sdn. Bhd. be joined as a defendant in order that the matter can be effectively and completely adjudicated upon.

Order accordingly.

Solicitors: *Shearn, Delamore & Co.; Allen & Gledhill; Skrine & Co.*

KUALA LUMPUR, KLANG & PORT SWETTENHAM OMNIBUS CO. BERHAD v. TRANSPORT WORKERS' UNION

[O.C.J. (Raja Azlan Shah J.) April 21, 1970]

[Kuala Lumpur — Originating Summons No. 380 of 1969]

Industrial Law — Trade unions — Meaning of "statutory authority" — Whether includes company incorporated under Companies Act, 1965 — Emergency (Trade Unions) Regulations, 1969 — Interpretation of statutes — Trade Unions Ordinance, 1959, s. 27(3).

The question raised in this application was whether the words "statutory authority" in section 27(3) of the Trade Unions Ordinance, 1959 include a company constituted under the Companies Act, 1965.

Held: the words "statutory authority" as enacted in section 27(3) of the Trade Unions Ordinance, 1959 do not include a company incorporated under the Companies Act, 1965.

Case referred to:-

(1) *Nuth* v. *Tamplin* (1881) 8 Q.B.D. 247, 253.

ORIGINATING SUMMONS.

V. C. George for the applicant company.

R. Ponnudurai for the respondent union.

Raja Azlan Shah J.: There arose a dispute between the Kuala Lumpur, Klang and Port Swettenham Omnibus Company Berhad, the applicant company in the present proceedings and the Transport Workers' Union (Federation of Malaya), the respondent union. The dispute had reached a stage where the Industrial Court was asked to adjudicate upon the matter but the hearing was adjourned to enable the applicant company to seek a ruling from this court on the following questions:

"1. Do the words 'statutory authority' include a company constituted under the Companies Act, 1965 for the purposes of section 27(3) of the Trade Unions Ordinance, 1959?

2. If so, have the employees of the Kuala Lumpur, Klang and Port Swettenham Omnibus Company Berhad ceased to be members of the respondent union?

3. If they have ceased to be members, (a) can the respondent union represent the said employees at the Industrial Court so as to cause them to be bound by any decision of the Industrial Court; and (b) is the reference by the Minister rendered void by virtue of the fact that the respondent union no longer represents the workers; and

4. In the circumstances should the Industrial Court proceed with the hearing of the case before it?"

It is conceded that for the present purpose only question No. 1 need be considered. It is urged on behalf of the applicant company that they are a statutory authority within the meaning of the definition "statutory authority" as enacted in section 27(3) of the Trade Unions Ordinance, 1959. If that is the case, then they argue that their employees cannot be members of the respondent union as their membership are not confined exclusively to persons employed by the applicant company and therefore the respondent union who claim to represent the workers of the applicant company have no *locus standi*. In other words it is urged that the words "statutory authority" are to be read literally and that I should not put a restricted meaning to it.

I will now cite the provisions of section 27 of the Trade Unions Ordinance, 1959, which came into force on June 1, 1959. Section 27 then had two subsections. Subsection (1) prohibits public officers from becoming members of trade unions. Subsection (2) gives certain exemptions whereby certain classes of public officers can become members of trade unions or that certain conditions can be imposed on those public officers who are members of trade unions.